

219368

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35020

**NORTHERN AND BERGEN RAILROAD, LLC
NOTICE OF EXEMPTION**

**SUPPLEMENTAL REQUEST FOR STAY
BY THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

On May 16, 2007, the New Jersey Department of Environmental Protection ("NJDEP") requested that the Surface Transportation Board ("Board") stay the effectiveness of the Notice of Exemption ("Notice") filed under the above referenced Finance Docket number by Northern and Bergen Railroad, LLC ("NBR") on April 26, 2007 pending the development of facts and details related herein based on NBR's failure to provide sufficient information. While it has responded to NJDEP's letter seeking additional information, NBR's response letters dated May 16 and May 18, 2007 indicate that NBR has failed to submit sufficient information concerning the scope and nature of its proposed activities. For example, although NBR is ostensibly purchasing an existing line of railroad, it appears that railroad service to the public in at least the recent past may have been virtually dormant, with the exception of the solid waste transfer operations conducted by the current shipper at the waste facility, Hudson Logistics, Inc. Accordingly, important questions remain concerning NBR and the alleged "rail transportation" service at the "Dundee Yard" in Passaic, New Jersey such that neither the Board nor NJDEP have "all the facts it ... needs," see NBR response at 4, fn3, to know whether NBR's proposal is entitled to use the

exemption procedures set forth at 49 C.F.R. §§ 1150.31- .34¹. In addition, based on the operating agreements provided by NBR concerning the site in question, NJDEP does not believe that the solid waste facility that NBR intends to acquire from New York Greenwood Lake Railway ("NYGL") involves "rail transportation" activities, (i.e., a transloading facility), but instead appears to be controlled by non-railroad third parties engaged in processing activities that are not integral to rail transportation²

More specifically, contrary to the comments contained in its May 18 Reply, NBR has not yet explained what its proposed rail transportation involves, whether it provides locomotive service or rail cars, whether it provides switching service or how it will serve its putative shippers. The mere fact that NYGL became a railroad, again using the summary Notice of Exemption procedure, does not in and of itself demonstrate that NBR is a bona fide railroad.

Moreover, given the importance of the health and safety of New Jersey's citizens, it is essential that the Board not permit NBR, or any entity that may provide some type of rail service, to misuse the preemption provision in section 10501(b) of the Interstate Commerce Commission Termination Act in order to maximize their profits by engaging in clearly environmentally

¹ NJDEP only received this additional information from NBR on May 16 and 18, 2007. It is the ongoing questions that stem from these additional submissions that NJDEP wishes to present to the Board and which are the basis for NJDEP's supplemental stay request. NJDEP, therefore, respectfully requests that the Board consider this submission.

² NBR argues that NJDEP "tacitly admits" that the currently operating waste facility is a legitimate rail facility because NJDEP cited the facility for violations of N.J.A.C. 7:26-2D 1, which is only applicable to bona fide rail carriers. However, NJDEP is only now in receipt of the relevant operating agreements for the facility that, at the very least, suggest that the facility is not a bona fide rail transportation facility. Accordingly, it may well be that the Hudson entities (Hudson Logistics, Inc. and Hudson Logistics Transloading, Inc.) in fact control these activities so that this operation is in reality a *Hi-Tech*-like sham railroad operation.

destructive practices (i.e., unregulated and dangerous solid waste activities). As NJDEP has argued in several proceedings before the Board, and as is evidenced by the recent May 17, 2007 article in the local newspaper, see Exhibit A, and recent experience, the Board has neither the staff nor resources to oversee the myriad of solid waste transfer facilities that continue to spring up

The Board has a major stake in ensuring that there is a bright line that separates rail "transportation" from activities that are not integral to rail transportation and that accordingly are not immunized from legitimate and essential state oversight. Even if it is structurally considered to be a railroad because of its acquisition of the NYGL, NBR's Notice of Exemption should not be construed as to fit all activities ostensibly being conducted in its name within the definition of rail "transportation." To the contrary, and as NJDEP has argued in the *New England Transrail* proceeding (F.D. 34797), the Board should make clear that activities that are not integral to rail transportation - - such as solid waste processing - - are not subject to the preemption provision of section 10501(b)

Simply stated, given the overbroad construction of section 10501(b) that has been claimed by several parties (and that has confused various courts), it is essential that the Board make it clear that the processing and transfer of solid waste is not subject to the Board's "exclusive" jurisdiction. Otherwise, the public will continue to be confronted and potentially harmed by the now well known sight of what happens when these operators are free to conduct their activities without regard to any governmental oversight.

And, the Board should similarly look closely at the bona fides of who is actually conducting the waste transfer operations and for whose primary benefit those activities are

conducted, so as to minimize the worsening problem confronted by New Jersey and other states where unscrupulous solid waste operators attempt to disguise their activities by calling themselves agents of railroads who conduct "transloading" services. While New Jersey is clearly supportive of rail transportation activities in general, has provided ample funds for legitimate rail infrastructure improvement, and supports the movement of solid waste by rail, it is by now evident that the handling and movement of solid waste cannot be viewed in the same light as is the movement of lumber, coal and other environmentally benign commodities. Hence, the identity and financial motivations of the parties that are actually involved in setting up and running profitable solid waste transfer facilities are key issues as to whether the activities are "by a rail carrier" or in fact integral to rail transportation, and whether the Notice of Exemption procedure applies to these waste activities. These key questions have not been satisfactorily answered by NBR, as is made clear by counsel to NJDEP's letter dated May 23, 2007 to NBR's counsel. See Exhibit B

Consequently, when dealing with issues such as those posed by NBR's announced plans, it is critical that the Board provide that the use of the summary Notice of Exemption procedure means only that the applicant may conduct legitimate rail transportation activities, and that this procedure does not carry with it the unfettered freedom to engage in the solid waste business without regard to state governmental oversight. In addition, to the extent NBR is claiming that those activities are being conducted by its agents, NBR has the burden of demonstrating that it is in fact receiving the primary financial benefit and is not being used as a front for solid waste entrepreneurs.

NJDEP accordingly requests that the Board continue its stay of the effective date of the

requested exemption and establish a procedural schedule for NBR to provide responsive information that demonstrates (1) that it is a bona fide railroad, (2) that it will serve the public as a common carrier, (3) that it will in fact control and receive the financial benefit of all activities that are conducted at the waste facility in its name, (4) that it will not attempt to misuse the section 10501 preemption provision in order to avoid or evade legitimate environmental, health and safety regulation by NJDEP and other state agencies, and (5) that the solid waste facility will immediately come into absolute compliance with the regulations in N.J.A.C. 7:26-2D.1 if NBR intends to claim ownership and control of this facility.³ NJDEP believes that, assuming NBR does intend to be a bona fide railroad, in view of the obvious importance of solid waste in its proposed operation and the highly lucrative nature of those activities, a requirement of this nature should not be burdensome on NBR. NJDEP also requests that it and other interested parties should be given an opportunity to respond to NBR's presentation.

³ NBR argues that the public health and safety violations at the current waste facility have been largely corrected. However, as NJDEP initially indicated, several, serious violations remain concerning dust, noise and fire control and waste continues to be tipped outside of the facility's building. See May 15, 2007 Verified Statement of Albert Raimund Belonzi, ¶¶ 4 and 5. Contrary to NBR's arguments, the absence of a Notice of Violation for continuing violations does not render the violations resolved.

Respectfully submitted,

STUART RABNER
ATTORNEY GENERAL
OF NEW JERSEY

By *Kevin P. Auerbacher* REC

Kevin P. Auerbacher
Deputy Attorney General
609-292-6945
Attorney for
New Jersey Department
of Environmental Protection

Dated: *5/2/11*

CERTIFICATE OF SERVICE

I certify that I have this day, May 23, 2007, served copies of the Supplemental Request for Stay in this proceeding (FD No 35020) by the New Jersey Department of Environmental Protection upon Jeffrey O Moreno, Esq., attorney for applicant, Northern and Bergen Railroad, LLC, via electronic mail at Jeff.Moreno@ThompsonHinc.com.


Michel D. McGahey

EXHIBIT A

HERALDNEWS

Print | Close

Residents rip trash site noise, debris

Thursday, May 17, 2007

By MEREDITH MANDELL
HERALD NEWS

PASSAIC -- Sixth Street residents feel state and local officials have left them in the dust, literally, in their attempt to fight the maddening noise and air pollution they say is generated from a solid waste transport facility.

Hudson Logistics contracts with property-owners New York Greenwood Lake Railway to load demolition debris onto railway cars for shipment to independent landfill sites in Ohio.

The company transports about 500 tons a day from its site on Passaic Street, known as "Dundee Yards." For \$1.4 million in 2006, the firm contracted with the railway owners after a fire on the site and the subsequent bankruptcy of the previous contractor. The company's manager said Hudson Logistics pays Passaic a host fee of \$150 a ton to continue its 500-ton-a-day operation.

Last week at a City Council meeting, resident Maria Tatepa, whose family has owned a house on Sixth Street since 1980, told officials that two years ago, she and more than 70 residents sent a letter to the state Department of Environmental Protection, Rep. Bill Pascrell Jr., D-Paterson, and the council about noise and dust coming from the site and have received no response.

"In the two years that has passed, it's gotten worse and they haven't done anything," Tatepa said from her home Tuesday.

The click-clack of heavy vibrations sometimes starts as early as 5:30 a.m. and goes on until midnight, she and other residents said Tuesday evening. Vibrations from machinery there sometimes tumble vases and force pictures to fall off the walls, they said.

"The dust is ridiculous. Sometimes we cannot open up the windows in our houses," said Nelson Zuniga, 33. "They use heavy machinery," he said, pointing to cracks in the hallway of his apartment, which he attributed to the daily disruptions.

Council President Gary Schaer said the council would look into whether it has the power to regulate the facility. City officials maintain that their hands are tied because the site falls under the federal Interstate Commerce Commission Termination Act of 1995, which stipulates that the federal Surface Transportation Board (STB) has exclusive jurisdiction over "transportation by rail carriers." The city cannot issue building permits on the site.

"The city for years, they've had difficulties with the railroad owner," said Keith Furlong, a spokesman for Mayor Samuel Rivera. "They've tried to purchase the property and they've tried to get the owners to agree to DEP restrictions. Furlong did not return subsequent telephone calls from a reporter concerning the city's contract with Hudson Logistics.

William Connolly, director of codes and standards for the state Department of Community Affairs, said the federal exemption applies to building permits -- not municipal requirements.

"They (the company) have limited protection in that they don't have to get a permit, but they do have to comply with all the municipal requirements that have to do with health and safety," Connolly said.

The company's manager, Ray Kalafsky, said in a telephone interview Wednesday the company is in compliance with state and local health and environmental regulations.

"We've worked very closely with the city and have tried to be good neighbors," Kalafsky said, adding that he was meeting with city officials Friday to discuss residents' concerns.

DEP, city and county health officials have inspected the site, according to inspection reports. The DEP issued an air-pollution violation to the Passaic site in the fall, according to spokesman Larry Hajna. The city has also issued various violations for strewn garbage and graffiti, records show.

"We are continuing to inspect and respond to complaints we receive," Hajna said.

Following a similar dispute in Freehold, Rep. Frank Pallone Jr., D-Long Branch, introduced H.R. 4821, a bill that would force solid-waste facilities to follow state environmental and health regulations.

"The reason for the railroad exemption is so we have railroads," Pallone said Wednesday in a telephone interview. "But there was never any intention that it would apply to a trash transfer station."

Copyright © 2007 North Jersey Media Group Inc.
Copyright Infringement Notice Use Agreement & Privacy Policy

[Print](#) | [Close](#)

EXHIBIT B



JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 093
TRENTON, NJ 08625-0093

STUART RABNER
Attorney General

ROBERT J. GILSON
Director

May 23, 2007

Jeffrey O. Moreno, Esquire
Thompson Hine LLP
1920 N. Street, N.W., Suite 800
Washington D.C. 20036 1600

**Re: STB Finance Docket 35020, Northern and Bergen Railroad, LLC—Verified
Notice of Exemption
Garfield and Passaic, New Jersey**

Dear Mr. Moreno:

We are in receipt of your letters dated May 16 and May 18, 2007 in response to our letter dated May 2, 2007 concerning the above referenced Notice of Exemption. There are a number of issues and questions that remain in light of your responses. In short, NJDEP still does not have sufficient information to determine whether Northern and Bergen Railroad, LLC ("NBR") is a legitimate rail carrier.

Moreover, based upon a review of the operating agreements that you provided concerning the solid waste services at the subject facility ("Facility") that NBR intends to acquire from New York Greenwood Lake Railway ("NYGL"), NJDEP is not persuaded that the Facility is a "rail transportation" facility as defined by the Interstate Commerce Commission Termination Act and the shipper is not operating the solid waste facility "on behalf" of, currently, NYGL. Most notably, the Facility Capacity Agreement is at a minimum an implicit shipper-controlled exclusive use contract such that the facility is primarily for the business and financial benefit of the shipper (currently Hudson Logistics, Inc.) and excludes others in the industry. *See* paragraph 1. Also notable is the fact that the shipper is responsible for funding the Facility. *See id.* Further, as indicated in the Host Community Benefit Agreement between NYGL and the City of Passaic, non-transportation activities (i.e. waste "processing") take place at the Facility.

The following are preliminary questions from NJDEP based on its review of your responses to date. NJDEP reserves the right to supplement these requests. In addition, by asking these



questions NJDEP is in no way indicating that responses to these questions end NJDEP's inquiry with respect to NBR's Notice of Exemption or concerning whether the Facility involves "rail transportation."

1 Please describe in detail the operations of the Facility. More specifically, you indicate that NBR will provide "rail transportation" service.

- a. However, what type of solid waste processing and other solid waste activities will take place at the Facility and who will be performing and responsible for such activities?
- b. Please explain the "rail transportation" service that NBR intends to provide, in other words, will NBR own, lease or operate locomotives or own or lease rail cars; how will the Facility and other shippers be switched; how many switches per day; and who will perform these services, etc.?

2 Please identify the current employees of NYGL that NBR intends to "operate" the Facility.

- a. What operations will such employees be responsible for?
- b. Will these employees be covered by the Railroad Retirement Act, 45 U.S.C. § 231 et seq., and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 et seq.?
- c. Will new operating agreements be negotiated between NBR and Hudson Logistics, Inc.?
- d. Does NBR anticipate hiring employees other than the current employees of NYGL?
- e. What is the relationship between and/or among NBR, Hudson Logistics, Inc., Hudson Logistics Loading, Inc., Chartwell International, Inc. and Raymond Toscano?

3. As Raymond Toscano "does not have experience providing common carrier rail service," why did Mr. Toscano create NBR in order to acquire NYGL's track?

- a. How much will Mr. Toscano pay for the sale?
- b. How is Mr. Toscano financing this sale?
- c. Why is Mr. Toscano choosing the railroad business and why is NYGL selling?
- d. How did Mr. Toscano learn of the proposed sale by NYGL?

4 You indicate that "Type 13 waste will be transported in covered steel gondolas."

- a What type of cover will be utilized?
- b What is meant, in light of this response, in response to number 13 that "NB[R] will transport Type 13 solid waste in 100 ton open top gondolas provided by Hudson Logistics?"

5 You indicate that NYGL "receives a fee of \$5 per ton that enters the solid waste transfer station." From whom does NYGL receive this payment and for what services is this payment for?

6. You indicate that NBR intends to comply with the regulations at N.J.A.C. 7-16-2D 1. However, NJDEP has cited NYGL for several of these regulations. For example.

- a What does NBR intend to do with the ongoing dust and noise problems at the Facility?
- b. When will the dry fire suppression system be installed and will you be supplying plans for this system?
- c. How will NBR ensure that the floor of the building is cleaned every day?

7 Because NJDEP believes that the Facility is not a rail transportation facility, does NBR intend to obtain a permit and otherwise comply with New Jersey's solid waste regulations set forth at N.J.A.C. 7:26-2.1 et seq.?

8. Who has entered into agreements with trucking companies that haul solid waste to the Facility?

May 23, 2007
Page 4

As you request, NJDEP is willing to meet with you to discuss these items.

Sincerely yours,

STUART RABNER
ATTORNEY GENERAL OF NEW JERSEY

By Ruth E. Carter
Ruth E. Carter
Deputy Attorney General